Supreme Court, U.S.
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Nos. 94-1749, 94-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SEAN JONES, ET AL.,
Petitioners,

v.

REGGIE WHITE, ET AL. AND
NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

MARK DUSBABEK, ET AL.,
Petitioners,

v.

REGGIE WHITE, ET AL. AND
NATIONAL FOOTBALL LEAGUE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should exercise its certiorari jurisdiction to review questions that the court below expressly declined to consider or decide.

2. Whether, in a class action properly certified under Federal Rule of Civil Procedure 23(b)(1) and involving claims predominantly for injunctive relief, class members who are subject to the class action court's personal jurisdiction have an absolute right to opt out of the class.

3. Whether, in a class action involving claims predominantly for injunctive relief, the presence of claims for monetary damages precludes class certification under Federal Rules of Civil Procedure 23(b)(1) and/or (b)(2).

PARTIES TO THE PROCEEDING

The National Football League (the "NFL" or the "League") and 28 of its member clubs are Respondents in this proceeding (the "NFL Respondents").* The NFL Respondents were the defendants in the proceedings before the United States District Court for the District of Minnesota and were appellees before the United States Court of Appeals for the Eighth Circuit.

NFL players Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy, and Dave Duerson, on behalf of the *White* class, are Respondents in this proceeding (the "Player Respondents"). The Player Respondents were the plaintiffs and the class representatives in the proceedings before the United States District Court for the District of Minnesota and were appellees before the United States Court of Appeals for the Eighth Circuit.

NFL players Sean Jones, Leslie O'Neal, Eric Allen, Cris Dishman, William Mathews, and Van Waiters are Petitioners in this proceeding (the "Jones Petitioners"). The Jones Petitioners were class members/objectors/plaintiffs-in-intervention in the proceedings before the United States District Court for the District of Minnesota and were appellants before the United States Court of Appeals for the Eighth Circuit.

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* The member clubs of the NFL who are Respondents in this proceeding are: The Five Smiths, Inc.; Buffalo Bills, Inc.; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; The Dallas Cowboys Football Club, Ltd.; PDB Sports, Ltd.; The Detroit Lions, Inc.; The Green Bay Packers, Inc.; Houston Oilers, Inc.; Indianapolis Colts, Inc.; Kansas City Chiefs Football Club, Inc.; The Los Angeles Raiders, Ltd.; The Los Angeles Rams Football Company, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; KMS Patriots, L.P.; The New Orleans Saints Limited Partnership; The New York Football Giants, Inc.; New York Jets Football Club, Inc.; The Philadelphia Eagles Football Club, Inc.; B&B Holdings, Inc.; Pittsburgh Steelers Sports, Inc.; Chargers Football Co.; Seattle Seahawks, Inc.; Tampa Bay Area NFL Football Club, Inc.; and Pro-Football, Inc.

NFL players Mark Dusbabek, Carl Lee, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Don Beebe, Gregory Scales, Maurice Hurst, John Fourcade, and Byron Evans are Petitioners in this proceeding (the "Dusbabek Petitioners"). The Dusbabek Petitioners were class members/objectors/plaintiffs-in-intervention in the proceedings before the United States District Court for the District of Minnesota and were appellants before the United States Court of Appeals for the Eighth Circuit.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 41 F.3d 402 (8th Cir. 1994) ("*White III*") and is reprinted in Petitioners' Appendix at 2-17. The decision of the District Court granting final approval to the settlement agreement, as amended, and the Final Consent Judgment entered in accordance therewith are reported at 836 F. Supp. 1458 (D. Minn. 1993) ("*White II*") and at 836 F. Supp. 1508 (D. Minn. 1993), respectively, and are reprinted in Petitioners' Appendix at 34-169 and 26-33, respectively. The decision of the District Court granting final approval to the original settlement agreement and enjoining the lawsuits of individual class

members is reported at 822 F. Supp. 1389 (D. Minn. 1993) ("*White I*") and is reprinted in Petitioners' Appendix at 170-300.

COUNTERSTATEMENT OF THE CASE

This labor dispute between NFL clubs and NFL players involved a broad challenge to the nature and structure of various player employment practices in the NFL, including the League's Plan B veteran player employment rules, the College Draft, the NFL Player Contract, and the League's preseason pay rules. At the heart of the dispute were the parties' conflicting views with regard to free agency. The players contended that they were entitled to complete free agency, under which each NFL player would be free, without restriction, to offer his services to every NFL team upon expiration of his contract. The League, on the other hand, maintained that there must be some restrictions on a veteran player's mobility so that the best NFL players would not flock to the more attractive markets or to the better quality teams, thereby disrupting competitive balance in the League and making the NFL's entertainment product less attractive to consumers.

In October 1987, several NFL players filed *Powell v. NFL*, Civ. No. 4-87-917 (D. Minn.), a mandatory class action alleging that the League's collectively bargained free agency system and various other employment practices violated the antitrust laws. The District Court in *Powell* certified a mandatory non-opt-out class action for injunctive relief and damages. *See Powell v. NFL*, 711 F. Supp. 959, 966-69 (D. Minn. 1989). In November 1989, the Eighth Circuit Court of Appeals held that the players' claim was barred by the nonstatutory labor exemption to the antitrust laws. *Powell v. NFL*, 930 F.2d 1293, 1303 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

Immediately following the Eighth Circuit's decision in *Powell*, the National Football League Players Association (the "NFLPA") purported to disclaim its status as the exclusive collective bargaining representative of NFL players. This step was intended to terminate the labor exemption, to put an end to collective bargaining, and to shift the labor dispute to the antitrust courts. Specifically, the NFLPA began funding and otherwise directing the filing of multiple antitrust actions against the NFL and its member clubs. Over the next three years, that campaign resulted in the filing of approxi-

mately 24 separate lawsuits, many of which were funded by the NFLPA, in fifteen federal and state courts across the country.

Among these cases was *McNeil v. NFL*, Civ. No. 4-90-476 (D. Minn.). *McNeil*, ostensibly brought by eight individual plaintiffs, challenged the legality of the League's Plan B free agency system. *McNeil* was tried to verdict in a ten-week trial. The jury found that Plan B: (1) "[had] a substantially harmful effect on competition in the relevant market for the services of professional football players"; (2) "significantly contribute[d] to competitive balance in the NFL"; and (3) was "more restrictive than reasonably necessary to achieve . . . competitive balance." *See McNeil v. NFL*, 1992-2 Trade Cas. (CCH) ¶ 69,982, at 68,769 (D. Minn. 1992) (Special Verdict Form). The jury awarded damages only to four of the eight plaintiffs in amounts significantly less than those four players had sought. *See id.*

Less than two weeks after the *McNeil* verdict, the Player Respondents filed this class action. The complaint originally sought only injunctive relief but was later amended to include a claim for antitrust damages. In October 1992, plaintiffs in *White*, as well as the plaintiffs in *McNeil*, moved for an injunction seeking to bar defendants from enforcing Plan B or imposing any other system limiting the market opportunities available to veteran NFL players whose contracts were to expire on February 1, 1993.

Against this backdrop of numerous and varied litigations, pending post-trial motions in *McNeil*, injunction motions in *McNeil* and in *White*, and the certainty of an appeal involving "complex and difficult" and "significant issues for appellate review,"[1] on January

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[1] In later approving the terms of the *White* class settlement, the District Court specifically identified several "significant issues for appellate review" that would have been raised in any appeal of the *McNeil* verdict, including: (1) the scope of the nonstatutory labor exemption; (2) the application of the rule of reason under Section 1 of the Sherman Act and, specifically, burden of proof issues related thereto; (3) the court's jury instructions regarding antitrust injury; and (4) its determination with regard to the League's "single enterprise" defense. *See White II*, 836 F. Supp. at 1467 n.25 (Pet. (continued...)

6, 1993, the parties reached an agreement in principle to settle the *White* case and a wide range of related litigation. The settlement was the result of extensive arm's-length negotiations between class counsel and the League. Pursuant to Rule 23(b)(1), the District Court conditionally certified a mandatory settlement class consisting of:

> (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final approval of the settlement of this action and the determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, through the date of final approval of the settlement of this action and the determination of any appeals therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team.

See Order, *White v. NFL*, Civ. No. 4-92-906 (D. Minn. Jan. 6, 1993); Order, *White v. NFL*, Civ. No. 4-92-906 (D. Minn. Feb. 17, 1993). In the words of the District Court:

> Those mandatory class certification orders have provided a vehicle for the settlement of, among other things, all player challenges to the Plan B veteran player reservation rules, the college draft and the preseason pay rules. The settlement is the critical step toward the final resolution of the longstanding dispute between the NFL clubs and their player-employees.

822 F. Supp. at 1395 (Pet. App. at 175).

In February 1993, the parties in *White* executed a formal Stipulation and Settlement Agreement that was designed to bring an

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[1](...continued)
App. at 56-58 n.25); *see also White I*, 822 F. Supp. at 1418 (Pet. App. at 184-85).

end to this litigation and to a wide range of related cases.[2] The settlement represented a compromise on a wide array of structural issues. For the players, the settlement provided, among other things, a system of unrestricted free agency for those with at least four years of accrued service in the League. Thus, the players were able to achieve their principal and overriding objective in bringing this litigation.

At the same time, the League was able to protect to some extent its interest in competitive balance by preserving the College Draft, limiting the number of players that could become free agents in any one year, providing a League-wide cap on salaries and the amount of money to be paid to untested rookies, and limiting the number of veteran free agents that the League's "better" teams could sign.

In addition to providing prospectively for a guaranteed share of League-wide revenues to be paid to all players (which will provide players with billions of dollars), the settlement called for a $115 million payment to be distributed to class members through a settlement distribution formula approved by the District Court. 822 F. Supp. at 1421-24 (Pet. App. at 253-62).

After notice was provided to class members, 73 NFL players (out of an identifiable class of approximately 5,000) filed objections to the proposed settlement. All objectors were given a full and fair opportunity to voice their objections, including the opportunity to produce witnesses, to cross-examine witnesses offered by others, and to offer exhibits, at a formal court hearing on the fairness, reasonableness, and adequacy of the proposed settlement. Many did so. That hearing also addressed defendants' request for an

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[2] *See* Stipulation and Settlement Agreement, *White v. NFL*, No. 4-92-906 (D. Minn. Feb. 26, 1993). As part of the global settlement, the parties also settled eleven other pending federal and state court player lawsuits, all funded by the NFLPA, challenging the League's player employment rules. *See White I*, 822 F. Supp. at 1416 n.36 (Pet. App. at 237 n.36).

order enjoining all pending and future cases brought by individual class members involving the employment practices at issue in *White*.

Several weeks after the fairness hearing, the District Court issued a 115-page order overruling all objections to the proposed settlement and enjoining individual lawsuits involving similar claims by class members. *See* 822 F. Supp. at 1426, 1433-35 (Pet. App. at 260, 288-94).

In May 1993, one week after the District Court's approval of the original Stipulation and Settlement Agreement but before the court had entered a final judgment, the NFL clubs and the NFLPA entered into a new Collective Bargaining Agreement that incorporated the material terms of the settlement agreement as well as other terms and conditions of player employment. *See* 822 F. Supp. at 1435-36 (Pet. App. at 295-397). The new Collective Bargaining Agreement was ratified by approximately 96 percent of all NFL players voting. *See* 836 F. Supp. at 1467, 1483 (Pet. App. at 54, 102-03). The parties then moved to amend the Stipulation and Settlement Agreement to conform its terms to those of the Collective Bargaining Agreement.[3]

The District Court proceeded again with a formal settlement approval process. After preliminary approval and notice to all affected class members (*see* Order, *White v. NFL*, No. 4-92-906 (D. Minn. June 2. 1993)), formal objections to the amended settlement agreement were filed on behalf of 28 NFL players. This group of player-objectors was a subset of the group that had objected to the original Stipulation and Settlement Agreement.

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[3] The viability of the Collective Bargaining Agreement between the NFL clubs and players may depend on the continuing existence of the *White* settlement. If the mandatory class in *White* is not upheld on appeal and the NFL exercises its option to terminate the settlement agreement, the viability of the Collective Bargaining Agreement will be in question.

In early July 1993, the District Court held a final approval hearing to consider the amended settlement agreement. All class members and other interested parties were again afforded the opportunity to object to or otherwise express their views on the fairness, reasonableness, and adequacy of the settlement agreement, as amended.

On August 20, 1993, the District Court entered an order incorporating all of the findings set forth in its earlier settlement approval order, making certain additional findings, overruling all of the objections to the amended Stipulation and Settlement Agreement, and granting final approval thereto. *See* 836 F. Supp. at 1468, 1504 (Pet. App. at 58-59, 168-69). The court also entered a Final Consent Judgment. *See* Final Consent Judgment, *White v. NFL*, 836 F. Supp. 1508 (D. Minn. 1993) (Pet. App. at 26-33).

In the following weeks, a total of seven appeals from the Final Consent Judgment were noticed, two of which were subsequently withdrawn. The Jones Petitioners and the Dusbabek Petitioners together comprise four of the five groups of appellants below. The appellants sought reversal of the District Court's judgment on essentially the same grounds upon which they seek this Court's grant of certiorari but, as further explained below, the Court of Appeals did not reach many of those grounds in resolving the appeals.

On December 6, 1994, the Eighth Circuit unanimously affirmed the District Court's judgment. Specifically, the Court of Appeals held that: (1) the District Court's class certification under Rule 23(b)(1) and its inclusion of *these* objectors in the mandatory class constituted a proper exercise of the District Court's discretion, 41 F.3d at 407-08 (Pet. App. at 12-14); (2) the interests of the plaintiff class were adequately represented by the named plaintiffs and their counsel and were adequately protected by the settlement agreement, 41 F.3d at 408 (Pet. App. at 14-15); (3) the class members were given adequate notice of the proposed settlement and were given multiple opportunities to challenge their inclusion in the plaintiff class, 41 F.3d at 408-09 (Pet. App. at 15-16); and (4) the District Court's injunction of related actions by individual class

members was a proper exercise of its jurisdiction over the mandatory class action, 41 F.3d at 409 (Pet. App. at 16-17).

Because the only remaining objectors to the settlement were all properly subject to the District Court's personal jurisdiction, the Eighth Circuit specifically declined to reach the primary issue presented here by the objectors and left undecided by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) -- "whether a trial court may certify a non-opt-out plaintiff class in an action brought primarily for injunctive relief under Fed. R. Civ. P. 23(b)(1)." 41 F.3d at 408 (Pet. App. at 14).

On January 20, 1995, the Eighth Circuit denied the objectors' petitions for rehearing and their suggestions for rehearing *en banc*. *See* Order, *Evans v. NFL*, Nos. 93-3375, et al. (8th Cir. Jan. 20, 1995) (Pet. App. at 1).

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT EXPRESSLY DECLINED TO REACH THE PRIMARY QUESTIONS RAISED BY PETITIONERS

> Because of our view of the jurisdictional issue, we do not reach the issue raised by the objectors and left undecided by *Shutts*, namely whether a trial court may certify a non-opt-out plaintiff class in an action brought primarily for injunctive relief under Fed.R.Civ.P. 23(b)(1).

White III, 41 F.3d at 408 (Pet. App. at 14).

The Petitioners raise as their primary questions presented in this Court whether, in light of the presence of claims for monetary damages, the District Court properly certified, and maintained over Petitioners' objection, a mandatory, non-opt-out class. Because neither of these issues was decided by the Eighth Circuit, however, this Court should adhere to its usual practice and decline to consider these questions.

The Eighth Circuit's decision in this case was extremely narrow. The court held only that, in *this* case, a class action that sought predominantly injunctive relief, the District Court's inclusion of the objectors and refusal to grant them opt-out rights was a proper exercise of the District Court's discretion because all of the objectors were subject to the District Court's personal jurisdiction. *White III*, 41 F.3d at 407-08 (Pet. App. at 12-14). The Court expressly declined to decide whether, in other circumstances, a trial court may certify a non-opt-out plaintiff class in an action involving claims for money damages but brought primarily for injunctive relief.

This Court has consistently refused to review questions not considered or decided by the lower court. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992); *Patrick v. Burget*, 486 U.S. 92, 99 n.5 (1988); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971); *California v. Taylor*, 353 U.S. 553, 556-57 n.2 (1957); *Duignan v. United States*, 274 U.S. 195, 200 (1927). There is no reason for the Court to depart from its usual practice here. For that reason alone, the petitions should be denied.

II. THE RESULT REACHED BY THE EIGHTH CIRCUIT IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENT AND WOULD NOT HAVE BEEN DIFFERENT IN OTHER CIRCUITS

Notwithstanding the Court of Appeals' jurisdictional finding and its express refusal to reach the primary issues presented in the instant petitions, Petitioners claim that the result below warrants review because it conflicts with this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S 797 (1985), and the Ninth Circuit's decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 114 S. Ct. 1359 (1994). Petitioners assert that these decisions stand for the proposition that, in a class action properly certified under Rule 23, all class members have an absolute right to opt out of all class actions involving claims for money damages.

Contrary to Petitioners' contentions, however, the result below is not in conflict with this Court's decision in *Shutts* or with the Ninth Circuit's decision in *Brown*. Accordingly, exercise of this Court's certiorari jurisdiction cannot be justified on that basis.

A. There Is No Conflict with this Court's Decision in *Phillips Petroleum Co. v. Shutts*

There is no conflict with this Court's decision in *Shutts* because: (1) all of the Petitioners herein were subject to the class action court's personal jurisdiction; and (2) the class' claims for injunctive relief in this case predominated over the class' claims for damages.

1. No *Shutts* Issue Is Presented Because the Objectors Were Subject to the District Court's Jurisdiction

Shutts simply did not consider whether due process requires that class members with monetary claims be given the right to opt out of a properly certified mandatory class. The issue in *Shutts* was one of personal jurisdiction -- whether a state court could acquire jurisdiction over, and therefore bind, out-of-state class plaintiffs who lacked "minimum contacts" with the forum. 472 U.S. at 806-15. The Court held that Kansas' class action rule, which afforded notice and an opt-out right to non-resident class members, provided a constitutionally sufficient basis upon which to adjudicate their claims because class members who chose not to opt out had impliedly consented to the state court's jurisdiction.[4]

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[4] *See Shutts*, 472 U.S. at 812 ("Any plaintiff may consent to jurisdiction. The essential question then, is how stringent the requirement for a showing of consent will be. We think that . . . the right to 'opt out,' [along with adequate notice,] satisfies due process.") (citations omitted); *id.* at 814 ("We conclude that the Kansas court properly asserted personal jurisdiction over the absent plaintiffs and their claims against [the defendant].").

Shutts therefore stands for the proposition that in class actions involving claims wholly or predominantly for money damages, an opportunity to "opt out" is necessary to establish consent to jurisdiction by class members over whom the court would not otherwise have jurisdiction. The opt-out reference in *Shutts* has nothing to do with, and cannot support, any unqualified due process right of class members to opt out of a class.[5]

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[5] Petitioners' own interpretation of *Shutts* has shifted over time. Some Petitioners who reside out-of-state argued below that *Shutts* guaranteed them a right to opt out, not because they were "absent" in the sense of being non-named, but because the class action court lacked a sufficient basis to exercise personal jurisdiction over them. *See, e.g.*, Objector/Appellant Byron Evans' Reply Brief (8th Cir. filed July 14, 1994), at 7 ("Evans' position throughout this matter has been that the exercise of jurisdiction over him by the Minnesota Court is inappropriate . . . . The Court cannot bind him to a settlement without affording him adequate notice, the right to opt out, and [adequate] representation within the class, *unless he has sufficient minimum contacts with Minnesota or he has consented to jurisdiction*.") (emphasis added); Reply Brief of Appellants Sean Jones, et al. (8th Cir. filed July 14, 1994), at 1 ("under the due process clause as elucidated in [*Shutts*], class certification of an action brought to resolve substantial damage claims belonging to *class members who are absent from the court's jurisdiction* cannot be granted [unless an opt-out right is afforded]") (emphasis added); *id.* at 12 ("*Given their lack of direct contacts with the forum*, Appellants had a constitutional right to opt out . . . . ") (emphasis added). After the courts below determined that Petitioners had consented to the District Court's jurisdiction, these Petitioners reversed field, and now argue in this Court that what below had been a "jurisdictional due process right" is actually an "absolute due process right."

Several courts of appeals, including the court below, have recently confirmed that the due process protections discussed in *Shutts* are unnecessary where, as in this case, the objecting class members are subject to the class action court's personal jurisdiction. There is no conflict whatsoever among the circuits on this unremarkable principle. *See, e.g., Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 & n.8 (3d Cir.) (notice plus an opportunity to be heard and participate in the litigation "are sufficient to bind *absent class members who had sufficient minimum contacts with the forum*") (emphasis added), *cert. denied*, 115 S. Ct. 480 (1994); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) ("Because there is no question that the court has jurisdiction over appellants, *Shutts* is inapposite. Thus, the district court did not abuse its discretion in denying appellants the opportunity to opt out of the class.") (emphasis added) (citations omitted), *cert. dismissed*, 113 S. Ct. 1070 (1993).

Even the Ninth Circuit -- the only circuit court as to which Petitioners claim a conflict -- has consistently interpreted *Shutts* as a case that defines the process necessary to bind class members who are not otherwise subject to the class action court's personal jurisdiction. Most recently, in *Silber v. Mabon*, 18 F.3d 1449 (9th Cir. 1994), the Ninth Circuit stated:

> *Shutts* involved a multi-state class action brought in state court. . . . The issue before the court was whether a state could exercise jurisdiction over the claim of *an absent, non-resident class action plaintiff who lacked sufficient minimum contacts with the forum to support personal jurisdiction* . . . .

Id. at 1453-54 (emphasis added); *see also Besinga v. United States*, 923 F.2d 133, 136 n.6 (9th Cir. 1991) (describing *Shutts* as a case which prescribes what process is due to bind "*absent class members who are citizens of other states*"; further suggesting that *Shutts* may be of limited application because "it involved a state class action rather than a class action in federal court pursuant to Rule 23") (emphasis added); *Mitchell v. Los Angeles Unified School Dist.*, 963 F.2d 258, 262 (9th Cir.) ("In its most recent discussion of class

action 'opt out' procedures, the Supreme Court considered whether protections beyond the opportunity to opt out were constitutionally required to safeguard the rights of *a class plaintiff who was out-of-state*") (emphasis added), *cert. denied*, 113 S. Ct. 375 (1992).[6]

In this case, each of the Petitioners was specifically found to be within the jurisdictional reach of the District Court by reason of his minimum contacts with the state of Minnesota and/or because he had consented to the District Court's jurisdiction by participating extensively in the class action settlement proceedings. The District Court, expressly affirmed by the Eighth Circuit, found that the out-of-state objectors had knowingly and voluntarily submitted to the District Court's jurisdiction by: (1) personally appearing at court hearings to argue in opposition to the District Court's approval of the settlement agreement; (2) offering live testimony and/or cross-examining witnesses concerning the merits of the proposed

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[6] *See also Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1517 n.51 (N.D. Ala. 1991) ("it is reasonable to view the particular due-process analysis in *Shutts* as limited to the situations of *the out-of-state class member*") (emphasis added), *aff'd*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2999 (1993); *Whitson v. Heilig-Meyers Furniture, Inc.*, No. 94-PT-0309-E, 1995 U.S. Dist LEXIS 4312, *48-*49 (N.D. Ala. Feb. 9, 1995) (*Shutts* stands for the proposition that in class actions "where a plaintiff class seeks primarily monetary relief, and where a proposed settlement seeks to bind *plaintiffs who are not subject to the personal jurisdiction of the court*, due process requires that class members be given an opportunity to opt out") (emphasis added); *Waldron v. Raymark Indus., Inc.*, 124 F.R.D. 235, 238 (N.D. Ga. 1989) (under *Shutts*, court refused to certify mandatory class where class members had "insufficient contacts to allow the court to exercise personal jurisdiction over them"); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 713-14 (E.D. Mich. 1985) ("The recent Supreme Court ruling in [*Shutts*] bars a mandatory class action under state law for most claims that are wholly or predominately for monetary damages *where most members of the class reside out of state")* (emphasis added).

settlement; and (3) filing numerous papers addressing the merits of the proposed settlement, including motions to intervene, an expert affidavit setting forth the estimates of their own damages, proposed findings of fact and conclusions of law, and memoranda of law. *See White I*, 822 F. Supp. at 1432 (Pet. App. at 287-88); *White II*, 836 F. Supp. at 1501-04 (Pet. App. at 160-65); *see also White III*, 41 F.3d at 407-08 (Pet. App. at 14) ("In the present case, each of the objectors either had minimum contacts with the forum or submitted himself to the jurisdiction of the district court by appearing through counsel to contest the merits of the settlement, offering testimony, cross-examining witnesses, and filing numerous memoranda of law regarding the settlement."). That conclusion, which is factual in nature, should be accorded deference by this Court. *See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Rodgers v. Lodge*, 458 U.S. 613, 623 (1982).

There is no question the activities described above are legally sufficient to constitute consent to jurisdiction in any context, including in the context of a mandatory class action. As the Third Circuit recently observed in *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989) -- a case upon which Petitioners placed significant reliance below -- "a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum." *Id.* at 771.

Because there is no question that the District Court had a proper basis upon which to exercise personal jurisdiction over Petitioners, they have no right to the procedural protections (including the opt-out right) prescribed in *Shutts*.[7]

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[7] The District Court also enjoined the objectors' individual actions concerning the same player practices at issue in *White*. In light of (continued...)

2. In Any Event, *Shutts* Would Not Require an Opt-Out Right in this Case Because it Involves Claims Predominantly for Injunctive Relief

Even if Petitioners had not been subject to the District Court's jurisdiction, there would still not be a conflict with this Court's decision in *Shutts* because this case, unlike *Shutts*, involved claims primarily for injunctive relief.

Shutts was a class action involving claims that were purely monetary in nature. *Shutts*, 472 U.S. at 799. In ruling that the Kansas state court had properly exercised jurisdiction over the *Shutts* class, the Court concluded that, in class actions seeking *predominantly money damages*, personal jurisdiction may be exercised over an absent nonresident class member only if he has been afforded individual notice and an opportunity to exclude himself from the class. *Id.* However, the Court specifically limited its holding to "those class actions which seek to bind known plaintiffs *concerning claims wholly or predominantly for money judgments.*" *Id.* at 811 n.3 (emphasis added). The Court expressly cautioned that "[w]e intimate no view concerning other types of class actions. . . ." *Id.*[8]

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[7](...continued)
the express findings of both the District Court and the Eighth Circuit that the objectors had consented to the jurisdiction of the class action court, however, objectors' challenge to the District Court's injunction raises no issue worthy of this Court's review.

[8] In dissenting from the dismissal of certiorari in *Ticor Title Ins. Co. v. Brown* last term, three members of this Court expressly noted the Court's limitation on the scope of its holding in *Shutts*. 114 S. Ct. at 1363 ("although we held in *[Shutts]* that there is a constitutional right to opt out of class actions brought in state court, *that holding was expressly 'limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments'")* (emphasis added) (O'Connor, J., joined by
(continued...)

But for the District Court's findings that each Petitioner's minimum contacts or litigation conduct had subjected him to the court's jurisdiction, the instant case would be precisely the "type of class action" about which the Court in *Shutts* intimated "no view." The District Court twice made express findings that the plaintiff class' claims for structural, injunctive relief in this case predominated over its claims for damages. *See White I*, 822 F. Supp. at 1410-11 (Pet. App. at 222-24); *White II*, 836 F. Supp. at 1471-72 (Pet. App. at 70-71). The Eighth Circuit expressly affirmed these findings, characterizing this class action as one "brought primarily for injunctive relief." *White* III, 41 F.3d at 408 (Pet. App. at 14).

Because neither petition seriously challenges the lower courts' "predominance" finding,[9] the issue decided by *Shutts* is simply not presented here. Moreover, because there is no basis for disturbing the lower courts' personal jurisdiction finding, the issue reserved by *Shutts* is not presented either.

B. For the Same Reasons that No *Shutts* Issue Is Presented, the Eighth Circuit's Decision Does Not Conflict with Ninth Circuit Authority

Petitioners claim that the decision below squarely conflicts with a single decision in the Ninth Circuit, *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. dismissed*, 114 S. Ct. 1359 (1994). *Brown* in no way calls into question or otherwise conflicts with the extremely narrow holding of the Eighth Circuit in this case.

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[8](...continued)
Rehnquist C.J., and Kennedy, J., dissenting from dismissal of certiorari).

[9] The Petitioners merely reiterate their view that the class action involved claims for "substantial" damages (*see* Jones Pet. at 3-4; Dusbabek Pet. at 8-9). *Shutts*, however, does not speak to "substantiality"; it speaks to "predominance."

Brown involved a collateral attack by absent non-resident class members to a mandatory class action settlement in which claims for "substantial" money damages had been involved. The district court granted defendants' motion for summary judgment, holding that the claims were barred under the doctrine of *res judicata*. *Brown*, 982 F.2d at 390.

The Ninth Circuit reversed, holding that while the absent class members were bound by the injunctive relief provided by the settlement agreement, the class members' individual claims for treble damages should proceed. *Brown*, 982 F.2d at 392. Purporting to follow this Court's decision in *Shutts* -- which the court expressly recognized "was limited to claims 'wholly or predominantly for money judgments'" -- the Ninth Circuit held that the absent class members should have been provided an opportunity to opt out of the prior class action. *Id.*[10]

The Ninth Circuit in *Brown* and the Eighth Circuit in *White* were deciding two very different issues. The Ninth Circuit was charged specifically with determining what process was due to bind absent non-resident class members who had not submitted to the jurisdiction of the class action court in a case wholly or predominantly for money damages. The Eighth Circuit, on the other hand, had the very different task of determining what process is due to bind absent class members who were subject to the class action court's jurisdiction in a case predominantly for injunctive relief.

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[10] This Court granted the *Brown* defendants' petition for certiorari on the single question of "[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on the ground that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 56 (1993). After oral argument, by which time "the parties had reached a settlement designed to moot the petition," the Court dismissed the writ as improvidently granted. *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1362 (1994).

There is no conflict between the Ninth Circuit's decision in *Brown* and the Eighth Circuit's decision in *White*.

Moreover, subsequent Ninth Circuit decisions undermine Petitioners' efforts to infer from *Brown* an absolute right to opt out of all class actions properly certified under Rule 23 in which claims for monetary relief are asserted. Less than seven months after the Ninth Circuit's decision in *Brown*, another panel of that court decided *Arata v. Nu Skin International, Inc.*, No. 92-15380, 1993 U.S. App. LEXIS 21747 (9th Cir. July 14, 1993), in which the Ninth Circuit affirmed a district court's certification and approval of a Rule 23(b)(1) mandatory non-opt-out class settlement where plaintiffs' complaint had sought both injunctive relief and damages.[11] The Ninth Circuit there held:

> The central issue in this action was the defendants' conduct in implementing the Nu Skin marketing scheme. The complaint plainly seeks, *in addition to damages*, both equitable and injunctive relief. An opt-out provision might create the risk of inconsistent or varying adjudications which could establish incompatible standards of conduct for the defendants. . . . Thus, the district court did not abuse its discretion in certifying a mandatory class under Rule 23(b)(1)(A) or (B).

Id. at *6-*7 (emphasis added); *accord Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 464 (N.D. Cal. 1994) ("Although some of the opinion's language is a little broad and imprecise, the opinion [in *Brown*] relies entirely on [*Shutts*]. . . . '*Shutts* is limited to claims wholly or predominantly, for money damages.' Thus, it seems clear that under *Ticor* and *Shutts*, the constitutional due process requirement of notice to absent class members applies *only* to cases where monetary damages 'predominate.'") (emphasis in original) (citations omitted).

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[11] Because *Arata* is an unpublished opinion, the decision has been reprinted and included in the Appendix hereto.

In sum, subsequent cases confirm that *Brown* was not intended to grant absent class members opt-out rights in all Rule 23 class actions involving claims for monetary damages. Indeed, in the nearly three years since it was decided, not one court, either inside or outside the Ninth Circuit, has relied on *Brown* for the proposition that opt-out rights are constitutionally required in *all* class actions seeking money damages.

III. RULES 23(b)(1) AND 23(b)(2) WERE NOT INTENDED, AND HAVE NEVER BEEN CONSTRUED, TO PRECLUDE CERTIFICATION OF MANDATORY CLASSES WHERE CLAIMS FOR MONETARY RELIEF ARE INVOLVED

Federal Rule of Civil Procedure 23 has governed class actions in the federal courts for nearly 30 years. During that period, the lower federal courts have fashioned a remarkably uniform and consistent view of the proper application of Rule 23.

One principle that has become well-settled, though nowhere specifically prescribed in the Rule itself, is that class actions seeking *solely* or *predominantly* money damages should not be certified under the mandatory class certification provisions of Rule 23(b)(1) or (b)(2) unless a limited fund is at issue. By the same token, however, the lower courts have consistently held that where a class seeks predominantly injunctive relief, even though monetary claims may also be asserted, mandatory class certification under Rules 23(b)(1) and/or (b)(2) is perfectly appropriate.[12] Indeed, *every* federal circuit court to have considered the issue has upheld the use of mandatory, non-opt-out class actions under Rules 23(b)(1) and/or

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[12] As three members of this Court recognized just last term, "[t]he lower courts have consistently held that the presence of monetary damage claims does not preclude class certification under Rules 23(b)(1)(A) and (b)(2)." *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1363 (1994) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting from dismissal of certiorari).

(b)(2) in cases that have involved claims for monetary relief, as long as injunctive claims predominated.[13]

Moreover, this Court has never questioned the propriety of mandatory class certification under Rules 23(b)(1) and/or (b)(2) in such cases and, in fact, expressly upheld the use of a mandatory class in a case involving monetary claims for government benefits. *Califano v. Yamasaki*, 442 U.S. 682, 701-03 (1979); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (vacating and remanding Rule 23(b)(2) mandatory class action for employment discrimination *because lower court had failed to award monetary backpay relief*) (emphasis added).[14]

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[13] *See, e.g., Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 31-33 (1st Cir. 1991); *Robertson v. NBA*, 556 F.2d 682, 685 (2d Cir. 1977); *Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 962-66 (3d Cir. 1983); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 801-02 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *King v. South Cent. Bell Tel. & Tel. Co.*, 790 F.2d 524, 528-31 (6th Cir. 1986); *Williams v. Burlington N., Inc.*, 832 F.2d 100, 103-04 (7th Cir. 1987), *cert. denied*, 485 U.S. 991 (1988); *Reynolds v. NFL*, 584 F.2d 280, 283-85 (8th Cir. 1978); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 339-42 (10th Cir. 1975); *Howard v. McLucas*, 782 F.2d 956, 961 (11th Cir. 1986); *Larionoff v. United States*, 533 F.2d 1167, 1181-82 n.36 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977).

[14] Petitioners' repeated intimations that the Ninth Circuit has demonstrated a divergent or more "enlightened" view regarding the proper utilization of mandatory class actions is wrong. The Ninth Circuit has routinely certified mandatory classes despite the existence of claims for monetary relief. *See, e.g., Arata v. Nu Skin Int'l, Inc.*, No. 92-15380, 1993 U.S. App. LEXIS 21747 (9th Cir. July 14, 1993) (reprinted in Appendix hereto); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Saunders v. Naval Air*

(continued...)

There is nothing in the text of Rule 23, or in the Advisory Committee's Notes that accompanied its adoption, to suggest that any other interpretation of Rule 23 was intended or is even reasonable. To the contrary, the Advisory Committee's Notes confirm that mandatory class certification is appropriate in cases predominantly involving claims for injunctive relief but also having significant damage claims.

The Advisory Committee provides as examples of appropriate cases for treatment under Rule 23(b)(1) a number of causes of action that would typically include claims for monetary relief: actions for damages against a common or limited fund, actions by shareholders to compel the declaration of a dividend, and litigations instituted by security holders or other beneficiaries of a trust against the trustee for breaches of his fiduciary duties. *See Amendments to Rules of Civil Procedure, Advisory Committee's Notes to Rule 23*, 39 F.R.D. 69, 100-01 (1966) (hereinafter "*Advisory Notes*").[15] Similarly, the fact that the Advisory Committee excludes from certification under (b)(2) claims "exclusively or predominantly [for] money damages" necessarily implies that claims for money damages

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[14](...continued)
Rework Facility, 608 F.2d 1308, 1312 (9th Cir. 1979); *EEOC v. General Tel. Co.* , 599 F.2d 322, 334 (9th Cir. 1979), *aff'd on other grounds*, 446 U.S. 318 (1980); *Elliott v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir. 1977), *aff'd in relevant part sub nom. Califano v. Yamasaki*, 442 U.S. 682 (1979).

[15] Among the cases cited by the Advisory Committee as examples of cases that typically would be eligible for mandatory (b)(1) certification were: *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947) (securities class action brought by former minority stockholder against Delaware parent corporation to recover class damages for fraud); *Edgerton v. Armour & Co.*, 94 F. Supp. 549 (S.D. Cal. 1950) (class action brought by former stockholders of dissolved corporation for sums due on contract); *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944) (class action brought by beneficiary of trust against trustee to recover damages for breach of fiduciary duties), *rev'd on other grounds*, 326 U.S. 99 (1945).

that do not predominate may be certified. *Advisory Notes*, 39 F.R.D. at 102. Such interpretation is confirmed by the types of actions the Advisory Committee lists as illustrative cases for mandatory class certification under Rule 23 (b)(2): civil rights cases, antitrust cases for illegal price discrimination, and actions alleging patent infringement -- all of which could, and usually do, include claims for money damages. *See id.*

In sum, the consistent treatment of mandatory class actions brought primarily for injunctive relief, but also involving damage claims, has established a sound rule of law that need not be reviewed by this Court. It can fairly be said that "[Rule 23(b)(1)'s] validation is its pedigree." *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990) (Scalia, J., joined by Rehnquist, C.J., and Kennedy, J., concurring).

CONCLUSION

For all of the foregoing reasons, the petitions should be denied.

Respectfully submitted,

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May 1995

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APPENDIX

PATRICIA ARATA, on behalf of herself and all others similarly situated, Plaintiff-Appellee, CHARLES C. BROWN, Plaintiff-Appellant, v. NU SKIN INTERNATIONAL, INC., a Utah corporation; CLARA McDERMOTT, Defendants-Appellees.

ARATA v. NU SKIN INTL., INC.

No. 92-15380

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1993 U.S. App. LEXIS 21747

July 14, 1993 **, Submitted, San Francisco, California

**The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a), Ninth Circuit R. 34-4.

August 24, 1993, Filed

NOTICE: [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *5 F.3d 534, 1993 U.S. App. LEXIS 30282.*

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. CV-91-02811-FMS. Fern M. Smith, District Judge, Presiding.

DISPOSITION: Affirmed

JUDGES: Before: WALLACE, Chief Judge; D.W. NELSON and O'SCANNLAIN, Circuit Judges.

OPINION: MEMORANDUM

Nu Skin is a self-styled "multi-level marketing program," in which distributors, lured by the promise of big money earned through little effort, purchase cosmetic and hygiene products in an effort to ascend a ladder of marketing positions. It is, in other words, a pyramid scheme. Distributors' earnings depend on product sales and commissions for recruiting new participants. To remain in the distribution ladder, and thus earn commissions from "downline" distributors, distributors must maintain a volume of wholesale purchases of Nu Skin products. Patricia Arata, a Nu Skin distributor, filed a class action against Nu Skin International, Inc., Blake M. Roney, Keith Halls, Clara McDermott, and Steven J. Lund (collectively, "defendants"), alleging that the defendants, in promoting and selling Nu Skin [*2] distributorships, violated federal securities laws and the Racketeer Influenced and Corrupt Organizations Act. She also asserts a number of state law claims.

On November 26, 1991, the district court certified a settlement class and granted preliminary approval of a proposed settlement agreement. The settlement class includes more than 835,000 current and former Nu Skin distributors. On January 20, 1992, the appellant, Charles Brown, submitted his objections to the proposed settlement agreement. On January 31, 1992, after a hearing to consider objections, the district court granted final approval to the settlement and awarded fees and costs to plaintiff's counsel.

Brown timely filed a notice of appeal on February 28, 1992. He contends that the district court erred in certifying a mandatory settlement class and, in approving the settlement and the award of attorneys fees, failed to protect the interests of absent

class members. We have jurisdiction pursuant to *28 U.S.C. § 1291*. We affirm.

I

The defendants have moved to dismiss Brown's appeal, contending that he lacks standing. The plaintiffs-appellees join the defendants' motion.

The settlement class [*3] certified by the district court is defined as "all persons who are or were Independent Distributors in the Nu Skin International, Inc., network marketing program within the past three years and who incurred a net economic loss." The defendants concede that Brown signed a distributorship agreement and charged $ 285.99 worth of Nu Skin products. The defendants allege, however, that Brown never picked up the products he charged. He claims that he did. The facts alleged by Brown put him within the definition of a class member. He received notice and filed an objection. As a member of the class, his legal rights are affected by the settlement. He therefore has standing to appeal. *Marshal v. Holiday Magic, Inc., 550 F.2d 1173, 1176 (9th Cir. 1977)*; see also Newburg on Class Actions, § 16.01, at 16-6 (3d ed. 1992).

II

Brown contends that the district court abused its discretion in certifying the class because all the requirements of Rule 23(a) have not been met. In particular, he contends that there are not questions common to the class and that the claims of the representative plaintiff are not typical of the claims of the class. See Fed. R. Civ. [*4] P. 23(a)(2) & (3). We review the district court's certification of a class for an abuse of discretion. *Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1304 (9th Cir. 1990)*.

A

It appears both from the complaint and from the record that there are common questions of law and fact. The complaint alleges that, to entice investors, the defendants created standardized, scripted telephone solicitations, promotional seminars, inspirational audio and video tapes, and written materials, all containing material misrepresentations and omissions. Declarations and exhibits in the record support the allegation that the defendants intended these uniform presentations to be used by others to recruit new distributors. Thus, the issue of the defendants' conduct in making misrepresentations and withholding information is common to all members of the class. The district court therefore did not abuse its discretion in finding the requisite commonality. See *Cameron v. E.M. Adams & Co., 547 F.2d 473, 477 (9th Cir. 1976); Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir. 1975)* (class of purchasers allegedly [*5] defrauded over a period of time by similar misrepresentations is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable), cert. denied, *429 U.S. 816 (1976); In re Activision Securities Litigation, 621 F. Supp. 415, 428 (N.D. Cal. 1985); Bresson v. Thomson McKinnon Securities, Inc., 118 F.R.D. 339, 342 (S.D.N.Y. 1988)*; cf. *Soper v. Valone, 110 F.R.D. 8, 9 (W.D.N.Y. 1985)* (common factual and legal issues did not predominate where similar oral presentations were utilized to garner investments in different entities).

B

Brown next contends that the representative plaintiff's claims are not typical of those of the class "for the nple reason that there was only one named plaintiff in the case and yet there are at least two different types of claimants or recoveries spelled out in the Refund Program of the Settlement Agreement." He argues that any distinction between types of recoveries provided for in the settlement agreement creates a conflict of interest such

that the district court abused its discretion [*6] in finding sufficient typicality. Brown's contention is without merit.

The class is defined as Nu Skin distributors who incurred net economic loss. From allegations in the complaint as well as in her declaration, Arata's claims appear to be typical of the claims of the class. Thus, the explicit requirement of Rule 23(a)(3) has been met. Brown has failed to persuade us that any distinctions drawn in the structure of the refund program are significant. See *Blackie, 524 F.2d at 909-10*; see also *Gates v. Dalton, 67 F.R.D. 621, 630 (E.D.N.Y. 1975)*. Indeed, Brown's arguments in this regard go more to the reasonableness of the settlement than to the typicality of the class representative.

III

Brown contends that district court abused its discretion by certifying a mandatory class under Rule 23(b). This contention is also without merit.

The central issue in this action was the defendants' conduct in implementing the Nu Skin marketing scheme. The complaint plainly seeks, in addition to damages, both equitable and injunctive relief. An opt-out provision might create a risk of inconsistent or varying adjudications which could establish [*7] incompatible standards of conduct for the defendants. Moreover, the settlement agreement establishes a comprehensive equitable remedy -- an ongoing refund program with no limit as to the amount to be refunded. Class members have a common interest in the preservation and equitable distribution of the refund program. Thus, the district court did not abuse its discretion in certifying a mandatory class under Rule 23(b)(1) (A) or (B). Cf. *McDonnell Douglas v. United States District Court, 523 F.2d 1083, 1086 (9th Cir. 1975)*, cert. denied, *425 U.S. 911 (1976)*.

IV

Brown makes a number of arguments challenging the certification of a defendant class. There is, however, no indication in the record that the district court certified a defendant class.

V

Finally, Brown challenges the fairness of the settlement agreement.

In this case, in accordance with the procedures outlined in the Manual for Complex Litigation 2d, the district court evaluated the proposed settlement and granted preliminary approval. See MCL 2d, § 30.44, at 241. Then, before granting final approval to the settlement agreement, the court solicited comments [*8] and held a hearing. See id. In its final order, the court indicated that it had considered the presentations of counsel and the relative merits of the claims and the defenses, the complexity of the case, the likely duration and expense of the trial, and the risks attendant to both trial and appeal and had concluded that the proposed settlement was fair, reasonable, and adequate under the circumstances. Our review of that conclusion is a limited one. *Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (1992)*, cert. denied, *113 S. Ct. 408 (1992)*. "We are not permitted to substitute our notions of fairness for those of the district judge and the parties to the agreement." Id. (quotations omitted). Rather, we ask only whether the settlement is "fundamentally fair, adequate, and reasonable." Id. (quotations omitted).

We will not dwell long on the majority of Brown's arguments. Most rest almost entirely on supposition. For example, he speculates that the short time frame between the filing of the suit and proposal of settlement precluded any serious negotiation and suggests collusion. He also speculates that counsel [*9] failed to undertake discovery and he complains that the

settlement is preferential to the defendants because it allows them to avoid defending multiple suits. Simply put, he has not made "a strong showing that the district court's decision was a clear abuse of discretion." *Id.* (quotations omitted). Brown's two strongest challenges are to the structure of the refund program and to the attorneys' fees provision. We briefly consider those two claims.

A

The settlement agreement is weighted in favor of those who return products, providing them with a ninety percent refund, while those who can prove only economic loss receive a ten percent refund. Moreover, the total amount of refunds paid to those without products to return cannot exceed more than thirty percent of the entire amount refunded. Brown contends this distinction is arbitrary and capricious. However, the refund program appears to be responsive to the gravamen of the complaint. As Brown recognizes, the defendants' scheme required distributors to "inventory load." He does not explain why it was arbitrary for the settlement program to focus on remedying that concrete injury. Nor does he explain in what way the refund program [*10] falls outside of the range of reasonableness.

B

The settlement provides for an award of attorneys' fees equal to ten percent of the amount refunded, with $ 800,000 of those fees to be paid on a non-refundable basis from a reserve account established by the defendants. Relying upon *Jamison v. Butcher & Sherrard, 68 F.R.D. 479, 484 (E.D. Pa. 1975)*, Brown complains that the $ 800,000 payment creates the impression that the defendants have bought themselves out of the lawsuit. Jamison, however, is clearly distinguishable. In that case, the district court did not approve the settlement because the class received nothing beyond that to which it was already entitled under a previous settlement with SEC. *Id. at 483*. Under the circumstances, the court noted that a direct payment of attorneys' fees left the impression that the defendants were buying themselves

out of the lawsuit. *Id. at 483-84.* Here, in contrast, the settlement provides a substantial remedy for the class. Brown also suggests that detailed time records should have been submitted in support of the fee award. However, under [*11] the settlement agreement, attorneys' fees are to be calculated as a percentage of the total recovery. See *Six Mexican Workers, 904 F.2d at 1311*; see also *In re Activision Securities Litigation, 723 F. Supp. 1373, 1370-79 (N.D. Cal. 1989)* (in class action common fund or "equitable" cases the better practice is to set a percentage fee and, absent extraordinary circumstances, the rate should be set at thirty percent). Thus, it is not clear what purpose submission of time records would have served.

VI

In short, Brown has failed to show that the district court abused its discretion in certifying a mandatory settlement class or in approving the settlement agreement.

AFFIRMED